

No. 89-341

In The
Supreme Court of the United States
October Term, 1989

WILLIAM E. GRADER,

Petitioner,

vs.

CITY OF LYNNWOOD, a municipal
corporation and political subdivision
of the State of Washington,

Respondent.

**BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI TO THE COURT OF
APPEALS OF THE STATE OF WASHINGTON**

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QUESTIONS PRESENTED

Whether the Washington State Court of Appeals correctly found insufficient evidence of intent to discriminate and proximate cause, and thus correctly reversed the trial court's denial of motions to dismiss at the close of plaintiff's case, for directed verdict, and for verdict notwithstanding the judgment.

**PARTIES TO THE PROCEEDINGS BELOW
AND RULE 28.1 STATEMENT**

The names of the parties to this proceeding are those contained in the caption of this case.

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Respondent City of Lynnwood, by and through its
counsel of record, respectfully presents this Brief in
Opposition to the Petition for a Writ of Certiorari to the
Court of Appeals of the State of Washington.

I. STATEMENT OF FACTS

William Grader obtained a conditional use permit
from the City of Lynnwood to build a billiard parlor/
warehouse on property adjacent to "Bill's Auto Parts"

which Grader also owned. Grader was told informally that he would have to ~~abate non-conforming conditions~~ at Bill's Auto Parts as a condition to the permit under Lynnwood Municipal Code 20.14.040. LMC 20.14.040 was interpreted for the City by its attorney, Patrick Curran, in connection with another business unrelated to Grader's project. That interpretation was applied to Grader by the Building Department.

Grader elected not to move his sign or add parking stalls as requested by the City. He also elected not to apply for a building permit or a variance. Instead, he sought review of the City's interpretation of the ordinance and ultimately obtained a ruling that the City's interpretation of the ordinance was incorrect. Grader still elected not to proceed with his project, however, instead filing an action for money damages under numerous state and federal theories. All state law claims were dismissed but the jury found in favor of Grader on his 42 U.S.C. § 1983 equal protection claim.

The Court of Appeals, Division I, reversed the trial court, finding insufficient evidence of intent to discriminate against Grader and of proximate cause. The Court found that "Grader exercised his own business judgment in a number of respects which precludes a finding that the City's actions were the proximate cause of his damages." The Court relied on Washington state law on proximate cause in determining that Grader's failure to seek a variance or proceed with development was the actual cause of his alleged damages from failing to build the billiard parlor/warehouse.

II. REASONS WHY PETITION SHOULD BE DENIED

A. PETITIONER HAS NOT MET ANY OF THE REQUIREMENTS FOR CERTIORARI.

Supreme Court Rule 17 delineates the criteria governing grant of certiorari. None of the three provisions in SCR 17 is applicable here. Petitioner has not shown that the Washington court has decided a federal question in a way conflicting with another state or federal court, or that the Court decided an important and unsettled question of federal law which should be settled by the Supreme Court, or in a way conflicting with a Supreme Court decision. Instead, petitioner argues only that the Court of Appeals erred in evaluating the evidence presented to the trial court and in determining it to be insufficient as a matter of law.

Petitioner does not challenge the instructions on 42 U.S.C. § 1983 or equal protection, which are thus the law of the case. *L.B. Foster Co. v. Hurnblad*, 418 F.2d 727 (9th Cir. 1969). The Court's instructions stated in part:

In order to constitute a denial of equal protection in the administration of the law, it is required that there be present either intentional or purposeful discrimination.

Court's Instruction 9. Another instruction provided that plaintiff had the burden of proof of establishing "the defendant intentionally or purposefully discriminated against the plaintiff." Court's Instruction 8. The Court of Appeals simply evaluated the evidence in light of the instructions and found insufficient evidence as a matter of law. There is no conflict with federal decisions in determining plaintiff failed to meet his burden of proof.

B. PETITIONER WAS NOT DEPRIVED OF THE RIGHT TO A JURY TRIAL.

Plaintiff argues that reversing a jury verdict for insufficient evidence violates his civil rights and is tantamount to "manufacturing evidence." This argument is completely without merit. The Federal Rules of Civil Procedure clearly provide for the Court to determine sufficiency of the evidence. Rule 50 allows for a directed verdict or for a judgment notwithstanding the verdict (JNOV) when plaintiff fails to make a prima facie case. Rule 56 allows summary judgment when defendant is entitled to dismissal as a matter of law. Rule 50 has been described as:

one of the devices of judicial control provided so that the court may enforce rules of law. It allows the court to take away from the consideration of the jury cases in which the facts are sufficiently clear that the law requires a particular result.

9 Wright & Miller, *Federal Practice and Procedure*, § 2521 at 537 (1971). When the trial court errs, as it did here, by failing to grant defendant's motions for summary judgment, directed verdict, or JNOV, the appellate court may properly review and correct the error.

Federal courts have determined civil rights cases on summary judgment, directed verdict, or JNOV on numerous occasions. See, e.g., *Southwood Adventure v. Pruitt*, 491 F.2d 5 (5th Cir. 1984) (dismissed for failure to state claim); *United Land Corp. v. Clark*, 613 F.2d 497 (4th Cir. 1980); *Cohen v. City of Philadelphia*, 736 F.2d 81 (3rd Cir. 1984) (dismissed on summary judgment); *Sucesion Suarez v. Gelabert*, 701 F.2d 231 (1st Cir. 1983); *Doe v. District of*

Columbia, 697 F.2d 1115 (D.C. Cir. 1983) (jury verdict reversed and remanded); *Hays v. Jefferson City*, 668 F.2d 869 (6th Cir. 1982) (jury verdict reversed); *Langurand v. Hayden*, 717 F.2d 220 (5th Cir. 1983) (jury verdict reversed).

In *Snowden v. Hughes*, 321 U.S. 1, 64 S. Ct. 391, 88 L. Ed. 497 (1944), this court affirmed dismissal of an equal protection claim because the plaintiff had insufficient evidence of "a purposeful discrimination between persons or classes of persons" *Snowden*, at 10. The Washington Court of Appeals specifically relied upon *Snowden* in reaching their decision. Grader's argument that he was deprived of a jury trial is unsupported by case law and is not a basis for certiorari. Grant of directed verdict has been in effect at least since 1850, *Parks v. Ross*, 11 How. (52 U.S.) 362, 13 L. Ed. 730 (1850). Taking the case from the jury on directed verdict, JNOV, or on review of denial of such motions does not deprive plaintiff of the right to a jury trial. As summarized by a fourth circuit court:

No constitutional question arises when the court withdraws from the jury a case in which there is no issue of fact requiring the jury's determination. The power of the court to withdraw such cases from the jury is too firmly rooted in history and tradition for frontal attack. . . . [I]ts employment . . . is a protective restriction as necessary to the vigorous functioning of the jury system as preservation of the prerogatives of the jury.

Manoia v. Potomac Elec. Power Co., 268 F.2d 793, 799 (1959), certiorari denied, 361 U.S. 913, 80 S. Ct. 225, 4 L. Ed. 2d 183. Further, this argument was not raised in the Court of

Appeals and thus cannot be the basis for review in this Court.

Grader misconstrues the decision in *Grader v. City of Lynnwood*, 45 Wn. App. 876, 728 P.2d 1057 (1986) (*Grader I*). In *Grader I*, the Court merely held that the City's interpretation of the ordinance was erroneous. The Court did not have the issue of money damages before it in *Grader I*, and was deciding only a question of statutory interpretation. In "*Grader II*," the Court was faced with a different issue: whether there was intentional discrimination by the City against Bill Grader. Because there was no evidence of intentional discrimination, the court properly found the trial court erred in submitting the case to the jury. There is a right to a jury trial only when there is evidence supporting the claim; submitting a case to the jury when unsupported by the evidence is reversible error. 42 U.S.C. § 1983 does not change these fundamental rules, nor does anything in § 1983 obviate the Federal or State Rules of Civil Procedure and Appellate Procedure. The Court of Appeals followed the law in evaluating the evidence. There is no conflict with any federal decisions and certiorari is not warranted.

III. CONCLUSION

Wherefore, respondent respectfully prays that the Petition for Writ of Certiorari be denied.

DATED this 15th day of September, 1989.

Respectfully submitted,

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